

Enesty Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R8-25-64 OF 1990

ABDUL KADIR SULAIMAN J

17 DECEMBER 1996

Revenue Law — *Income tax — Assessment — Requirement of — Whether Director General of Inland Revenue was under duty or obligation to make an assessment and issue notice of assessment where no income was taxable — Income Tax Act 1967 ss 77, 95 & 96*

Revenue Law — *Income tax — Assessment — Meaning of — Whether assessment must be made in the appropriate prescribed form — Whether calculations done on any piece of paper to enable the Inland Revenue Department to come to a decision in relation to tax leviable on taxpayers amounted to an assessment — Income Tax Act 1967 s 93*

Pursuant to s 77 of the Income Tax Act 1967 ('the Act'), the applicant furnished the respondent with returns containing particulars for the purpose of ascertaining the chargeable income for the years of assessment 1982, 1983 and 1984 ('the years of assessment'). However, in furnishing the particulars, it failed to elect in writing to claim the normal rate of capital allowances on its assets pursuant to Income Tax (Qualifying Plant Annual Allowances) (Amendment) Rules 1980. The applicant's tax agent wrote to the respondent enclosing revised tax computations including the claim for the tax allowances. This was rejected by the respondent. The applicant again wrote to the respondent requesting, inter alia, notices of assessment ('the notices') pursuant to s 96(1) of the Act to enable an appeal to be made to the Special Commissioners. This again was rejected by the respondent. The applicant applied for an order of mandamus to direct the respondent to issue and cause to be served on the applicant notices of assessment in respect of tax for the years of assessment.

The issues before the court were, inter alia: (i) whether the respondent had a duty or obligation under the law to make an assessment and to issue such notices of assessment when the returns of income submitted by the applicant disclosed that there was no income upon which tax may be assessed and levied; and (ii) whether notwithstanding that no tax was leviable, the respondent was still required under law to serve the notices because the respondent would have done an assessment to come to a conclusion that no tax was payable in respect of the years of assessment.

Held, dismissing the application with cost:

- (1) When an assessment is made, by s 96(1) the Director General is required as soon as may be after that to cause a notice of assessment to be served on the taxpayer concerned. It follows therefore, that if there is no chargeable income in respect of any year of assessment, no assessment is required and therefore no

A notice of assessment would be served on the taxpayer who had submitted a return to the respondent under s 77 of the Act.

B In the present case, as the respondent found that the applicant had no chargeable income which would attract any income tax to be paid by the applicant in respect of the years of assessment, it was outside its public duty to make any assessment and this was reflected in its conduct of not serving any notices of assessment for those relevant years on the applicant as there was nothing to give notice about. There was no statutory duty placed upon it in the circumstances to be enforced through mandamus (see p 109F-I).

C (2) Section 93 requires that in order for it to be called an assessment made by the respondent, it must be made in the appropriate prescribed form. It is not an assessment made for the purpose of s 93 of the Act if it is merely done on any piece of paper to work out certain calculation to enable the respondent to come to a decision in relation to tax leviable on taxpayers. In the
D circumstances, the issue of making an assessment in respect of a nil or a negative figure would not arise in relation to the requirement of the Act (see p 111B-F); *Lloyds Bank Export Finance v Commissioner of Inland Revenue* [1991] STC 474 distinguished and *The King v The Deputy Commissioner of Taxation for South Australia, ex p Hooper* (1926) 37 CLR 368 followed.

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[Bahasa Malaysia summary]

Menurut s 77 Akta Cukai Pendapatan 1967 ('Akta tersebut'), pemohon telah memberikan penentang penyata yang mengandungi butir-butir untuk tujuan menentukan pendapatan bercukai untuk
F tahun-tahun taksiran 1982, 1983 dan 1984 ('tahun taksiran'). Namun demikian, dalam menyediakan butir-butir, ia gagal memilih secara bertulis untuk menuntut kadar biasa pada elaun kapital atas asetnya menurut Kaedah-Kaedah Cukai Pendapatan (Qualifying Plant Annual Allowances) (Pindaan) 1980. Ejen cukai pemohon telah menulis kepada penentang dengan melampirkan hitungan cukai yang disemak termasuk tuntutan untuk elaun cukai. Ini ditolak oleh penentang.
G Pemohon menulis sekali lagi kepada penentang dengan meminta, antara lain, notis taksiran ('notis tersebut') menurut s 96(1) Akta tersebut bagi membolehkan rayuan dibuat kepada Pesuruhjaya Khas. Ini juga telah ditolak oleh penentang. Pemohon membuat permohonan
H untuk satu perintah mandamus mengarah penentang supaya mengeluarkan dan menyebabkan notis tersebut disampaikan ke atas pemohon berkaitan dengan cukai untuk tahun taksiran.

Isu-isu di hadapan mahkamah adalah, antara lain, sama ada:
I (i) penentang wajib di sisi undang-undang untuk membuat suatu taksiran dan untuk mengeluarkan notis taksiran demikian apabila penyata pendapatan yang diserahkan oleh pemohon mendedahkan bahawa tiada pendapatan atas mana cukai boleh ditaksir dan dikenakan; dan (ii) tanpa mengendahkan bahawa tiada cukai patut dikenakan, penentang masih dikehendaki di bawah undang-undang untuk menyampaikan notis tersebut kerana penentang menjalankan

satu taksiran bagi mencapai kesimpulan bahawa tiada cukai harus A
dibayar berkaitan dengan tahun taksiran.

Diputuskan, menolak permohonan dengan kos:

- (1) Melalui s 96(1) Akta tersebut, seberapa segera yang boleh selepas B
suatu taksiran telah dibuat Ketua Pengarah dikehendaki
menyebabkan satu notis taksiran disampaikan ke atas pembayar
cukai berkenaan. Dengan itu, ini bermakna bahawa jika tiada
terdapat pendapatan bercukai berhubung dengan mana-mana
tahun taksiran, tiada taksiran diperlukan dan maka tiada notis taksiran
akan disampaikan atas pembayar cukai yang telah menyerahkan C
penyata kepada penentang di bawah s 77 Akta tersebut.

Dalam kes ini, oleh kerana penentang mendapati bahawa
pemohon tidak mempunyai pendapatan bercukai yang akan
menarik apa-apa cukai pendapatan untuk dibayar oleh pemohon
berkaitan dengan tahun taksiran, ia adalah di luar kewajipan
awam untuk membuat apa-apa taksiran dan ini dibayangkan D
dalam tindak-tanduknya dalam tidak menyampaikan sebarang
notis taksiran untuk tahun yang relevan pada pemohon kerana
tiada apa-apa untuk diberikan notis. Tiada kewajipan statutori
yang terletak padanya dalam keadaan demikian untuk
dikuatkuasakan melalui mandamus (lihat ms 109F-I).

- (2) Seksyen 93 mensyaratkan bahawa bagi memanggilnya taksiran E
yang dibuat oleh penentang, ia mestilah dibuat dalam bentuk
yang ditetapkan yang wajar. Ia bukanlah taksiran yang dibuat
untuk tujuan s 93 Akta tersebut jika telah dibuat semata-mata
atas mana-mana helai kertas bagi mengira penghitungan tertentu
bagi membolehkan penentang mencapai keputusan berkenaan F
dengan cukai yang harus dikenakan atas pembayar cukai. Dalam
keadaan demikian, isu membuat taksiran berkenaan dengan satu
angka kosong atau negatif tidak akan timbul berhubung dengan
keperluan Akta tersebut (lihat ms 111B-F); *Lloyds Bank Export
Finance v Commissioner of Inland Revenue* [1991] STC 474 dibeza
dan *The King v The Deputy Commissioner of Taxation for South
Australia, ex p Hooper* (1926) 37 CLR 368 diikut.] G

Notes

For cases on assessment of income tax, see 10 *Mallal's Digest* (4th Ed, H
1996 Reissue) paras 1730-1739.

Cases referred to

King, The v The Deputy Commissioner of Taxation for South Australia,
ex p Hooper (1926) 37 CLR 368 (folld)
Lloyds Bank Export Finance v Commissioner of Inland Revenue [1991] I
STC 474 (distd)

Legislation referred to

Income Tax Act 1967 ss 77, 90, 93, 95, 96

- A *Goh Ka Im (Shearn Delamore & Co)* for the appellant.
Kok Keng Fai (Legal Officer, Inland Revenue Board of Malaysia) for the respondent.

Abdul Kadir Sulaiman J: This is an application for an order of mandamus to direct the respondent to issue and cause to be served on the applicant notices of assessment in respect of tax for the years of assessment 1982, 1983 and 1984. On 13 August 1996, I heard the application and, at the end of it, I dismissed the said application with costs to the respondent. I now provide my reasons for arriving at such a decision.

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The applicant pursuant to s 77 of the Income Tax Act 1967 ('the Act') furnished to the respondent returns containing particulars for the purpose of ascertaining the chargeable income for the years of assessment 1982, 1983 and 1984. However, in furnishing the particulars, it has failed to elect in writing to claim the normal rate of capital allowances on its assets pursuant to the Income Tax (Qualifying Plant Annual Allowances) (Amendment) Rules 1980 ('the 1980 Rules'). By a letter dated 27 January 1987, the applicant's tax agent wrote to the respondent enclosing revised tax computations in respect of the said years of assessment including the claim for the said capital allowances. By its reply of 18 March 1987, the respondent rejected the said revised tax computations, giving its reasons for such rejection. After several appeals made, by a letter dated 9 August 1988, the tax agent wrote in reply to another letter from the respondent of 25 May 1988, inter alia:

Withdrawal of claim

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In the event that the Revenue is still of the view that its decision should stand, then the company has no alternative but to withdraw its claim for annual allowances in respect of some of its expenditure on its assets. Kindly confirm that the Act does not prohibit the withdrawal of a claim, so as to enable us to put up appropriate revised statements of claim for annual allowances for the said years of assessment.

Request for notices of assessment

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If the Revenue is of the view that our client can neither elect now nor withdraw its claim in respect of certain expenditure, we shall be much obliged if relevant notices are issued in accordance with s 96(1), in order to enable an appeal to be made to the Special Commissioners.

Our request for the above stems from the following:

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(i) In the absence of such notices, there is no further avenue of appeal available to our client.
(ii) The courts view the word 'assessment' referred to in revenue legislation generally, and s 90(1) [of the Income Tax Act 1967] in particular, to refer to the *act* of assessing a person.
(iii) The statutory duty imposed on the Director General by ss 90(1) and 96(1) to make an assessment and cause a notice of such assessment to be served on all persons who have submitted a return of income.
(iv) Section 152 which empowers the Director General to authorize the use of a suitable substitute for any prescribed form.

By a letter dated 28 September 1988, the respondent replied to the said letter of the tax agent as follows: A

Per: *Enesty Sdn Bhd C 877652-00*

Adalah saya diarah merujuk kepada surat tuan bertarikh 9 Ogos 1988 dan perbincangan yang diadakan pada 10 Ogos 1988.

2 Keputusan Jabatan bertarikh 25 Mei 1988 dibuat setelah menimbang segala aspek mengenai kes tersebut di atas. Dukacita dimaklumkan keputusan itu tetap dikekalkan sungguhpun keterangan pihak tuan adalah dihargai. Berhubung dengan permintaan untuk satu notis taksiran dikeluarkan, sila maklum bahawa ini tidak dapat dibuat kerana syarikat tersebut tidak mempunyai keuntungan yang boleh dikenakan cukai pendapatan. Walau bagaimanapun, cawangan jabatan kami akan mengeluarkan *surat pengiraan cukai pendapatan* bagi tahun-tahun taksiran yang berkenaan untuk perhatian tuan dalam sedikit masa lagi. (Emphasis added.) B C

By a letter dated 1 December 1988, the respondent supplied the 'surat pengiraan cukai pendapatan' for the years of assessment 1982 to 1984 showing no 'pendapatan bercukai' for each of the years. D

The applicant in its affidavit in support of this motion, affirmed by its General Manager, Abdul Hamid bin Tan Sri Hj Hussain affirmed on 29 May 1990, deposed that the respondent by saying in the letter that the applicant has no 'profits' to be assessed to income tax, must have made an assessment in order to enable it to say that the applicant had no chargeable 'profits' subject to income tax. E

It is also the contention of the deponent that, under s 96(1), it is mandatory for the respondent to cause a notice of assessment to be served on the person assessed as soon as possible after an assessment is made. In the light of what was contained in the letter from the respondent of 1 December above, the respondent must issue and caused to be served on the applicant the relevant notices of assessment. For failing to do so, an order of mandamus would lie to enable the applicant to make an appeal against the assessment to the Special Commissioners after the service of a notice of assessment as stipulated in s 99(1). F

The issue therefore, is whether the respondent had failed in its duty in the circumstances to make an assessment and to issue such notices of assessment to the applicant. The order of mandamus would issue against the respondent if it has a public duty or obligation under the law to make an assessment and to issue such notices of assessment when the returns of income submitted by the applicant for the years 1982, 1983 and 1984 disclosed that there was no income upon which tax may be assessed and levied. G H

Sections 90(1), 95(1) and 96(1) state as follows:

90 (1) Where a person has delivered a return under section 77 to the Director General for a year of assessment, the Director General may —

- (a) accept the return and make an assessment accordingly; or
- (b) refuse to accept the return and, according to the best of his judgment, *determine the amount of the chargeable income of that person for that year and make an assessment accordingly.* I

A 95 (1) Where the case is such that if an assessment in respect of an amount of chargeable income for a year of assessment were to be made the tax charged thereby would be the sum of less than twenty-five ringgit, the Director General may *waive the making of the assessment* which would otherwise be made in that case:

B Provided that that waiver shall not prevent an assessment being made in an amount of chargeable income which includes that first-mentioned amount and in an amount of tax charged on that second-mentioned amount.

C 96 (1) As soon as may be after an assessment has been made, the Director General shall cause a notice of assessment to be served on the person in respect of whom the assessment was made. (Emphasis added.)

From s 90(1), it is clear that the precondition for the making of the assessment for the purpose of charging the tax on the taxpayer is the determination of the amount of the chargeable income of the taxpayer. Upon the determination of the chargeable income, either through the acceptance of the return submitted by the taxpayer or according to the best judgment of the Director General, an assessment is to be made. The assessment is not an assessment to determine the amount of chargeable income but to determine the tax to be charged and to be paid by the taxpayer to the Revenue. Under s 95(1), even where the chargeable income is determined but if an assessment were to be made, the amount of tax to be charged against the taxpayer amounts to the sum of less than RM25, the Director General has the discretion to waive the making of the assessment in respect of the particular taxpayer. It is only after the determination of the chargeable income and that the waiver is not applicable that the Director General is required to make an assessment to determine the amount of tax to be charged upon the taxpayer. When the assessment is made, by s 96(1) the Director General is required as soon as may be after that to cause a notice of assessment to be served on the taxpayer concerned. It follows therefore, that if there is no chargeable income in respect of any year of assessment, no assessment is required and therefore no notice of assessment to be served on the taxpayer who had submitted a return to the respondent under s 77 of the Act. Similarly, no assessment is necessary and therefore, no notice of assessment would be issued and served on the taxpayer in circumstances mentioned in 95(1) where the Director General exercises his powers to waive the making of the assessment in respect of the chargeable income.

H In this present case before me, the applicant submitted its return under s 77 for the years of assessment 1982, 1983 and 1984. It omitted to include claims for allowances allowed by the 1980 Rules in the said returns. It is not in dispute that those returns sent did not disclose any chargeable income in respect of each of the years. So, the respondent is not under his public duty to make an assessment to determine the tax to be charged upon the applicant. As there is no duty upon him to make an assessment, which in fact no assessment was made, there is nothing in the nature of a notice under s 96(1) which is required to be served on the applicant in respect of the years of assessment 1982, 1983 and 1984. The

letter from the respondent to the tax agent of the applicant of 1 December 1988 speaks very loud of this fact. The applicant through its tax agent attempted the submissions of revised tax computations in respect of those years of assessment subsequent to the submissions of the annual returns, containing particulars of claim for capital allowances under the 1980 Rules which it omitted to do so in the respective returns sent earlier. This was rejected by the respondent for the reason given in its letter of 28 September 1988. However, the respondent in the said letter informed the applicant's tax agent that it would issue a letter pertaining to the calculation of income tax for the respective years of assessment 1982, 1983 and 1984 in due course. This calculation is tabulated in the respondent's letter of 1 December 1988 mentioned earlier which disclosed that there was no tax due from the applicant in respect of those years of assessment. So, based on the relevant sections of the Act mentioned above, the matters stated in the letter of 1 December 1988 cannot be taken to be an assessment made by the respondent within the contemplation of the Act.

It is the contention of the applicant that notwithstanding the fact that there was no tax leviable the respondent is still required under the law to serve on it the notice of assessment because the respondent would have done an assessment in order to come to the conclusion that no tax is payable by the respondent in respect of those years of assessment. The learned counsel for the applicant referred to *Lloyds Bank Export Finance Ltd v Commissioner of Inland Revenue* [1991] STC 474 as an authority for the proposition. In that case cited, the Privy Council in an appeal from New Zealand in giving meaning to s 19 of Income Tax Act 1976 of New Zealand held that the expression 'make assessment' meant the process by which the commissioner carried out his statutory obligation to ascertain the amount on which tax was payable and the amount of tax. When the process of determining the assessable income was complete, an assessment had been made irrespective of whether the amount on which tax was payable, produced by that process, was a positive, a nil or a negative figure. The commissioner's determinations that no tax was payable by the taxpayer for the relevant years of assessment had therefore constituted the making of 'assessment' for the purpose of s 19. The New Zealand s 19 is in pari materia with our s 90(1) mentioned earlier. If the consideration is to be placed on the interpretation of our s 90(1) alone on the authority of *Lloyds Bank Export Finance Ltd*, it would appear that the applicant has made out its case against the respondent to get this court to issue mandamus against the respondent to compel it to issue to and caused to be served on the applicant notices of assessment for the years of assessment 1982, 1983 and 1984. But in that case, no mention was made on the equivalent provisions as found in our s 93 of the Act which states:

93 An assessment in respect of a person shall —

- (a) be made in the appropriate prescribed form;
- (b) indicate, in addition to any other material included therein, the appropriate year of assessment and the amount or additional amount of chargeable income and the tax charged thereon or the amount of tax or additional tax, as the case may be; and

- A (c) specify in the appropriate space in that form the date on which that form was duly completed,
- and, where that form appears to have been duly completed the assessment shall, until the contrary is proved, be presumed to have been made on the date so specified.
- B Section 93 requires that in order for it to be called an assessment made by the respondent, it must be made in the appropriate prescribed form. It is not an assessment made for the purpose of s 93 of the Act if it is merely done on any piece of paper for, it is unavoidable for the respondent in the discharge of its duty under the Act to have to use pieces of papers to work out certain calculation to enable it to come to a decision in relation to tax leviable on taxpayers. An instance is in the exercise of its discretion pursuant to s 95(1) in waiving the making of the assessment which would otherwise be made where the tax charged thereby would be a sum of less than RM25. In the circumstances, the issue of making an assessment in respect of a nil or a negative figure as so held in *Lloyds Bank Export Finance Ltd* would not arise in relation to the requirement of our Act. Thus, in the light of the position of the applicant in relation to the income for the years of assessment 1982 to 1984, the respondent cannot be required to issue notice of assessment for the relevant years of assessment as so required by the applicant by this application. My view in relation to the fact that any calculations done by the respondent on any pieces of paper does not constitute the making of assessment for the purpose of the Act is supported by the dicta of Isaac J in *The King v The Deputy Commissioner of Taxation for South Australia ex p Hooper* (1926) 37 CLR 368 at p 373:
- F An 'assessment' is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment'.
- G Eusoff Chin J (as he then was) in his grounds of judgment at the leave stage in refusing leave for the present applicant to apply for an order of mandamus in this case had aptly summed up his reasons for the refusal. I would adopt wholly the reasoning given by the learned judge which is found in encl 6 in dealing with this substantive application. In this case, as the respondent found that the applicant had no chargeable income which would attract any income tax to be paid by the applicant in respect of the years of assessment 1982 to 1984, it was outside its public duty to make any assessment and this is reflected in its conduct of not serving any notices of assessment for those relevant years on the applicant as there was nothing to give notice about. There is no statutory duty placed upon it in the circumstances to be enforced through mandamus. For that reason, this application of the applicant was on 13 August 1996 dismissed with costs to the respondent.
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Application dismissed.